IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 61851-2-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
JOHNNY ANTHONY SHEARS,	)	Unpublished Opinion
	)	
Appellant.	)	FILED: September 28, 2009

Lau, J. — Johnny Shears challenges his conviction for two counts of second degree assault. He contends the trial court abused its discretion by excluding a hearsay statement from one of the victims that her former boyfriend committed the assaults. He argues the statement should have been admitted under ER 803(a)(4). But because the statement is not "reasonably pertinent to diagnosis or treatment," the trial court did not abuse its discretion. Shears also argues that prosecutorial misconduct denied him a fair trial. We reject this argument because the conduct was neither improper nor prejudicial. As Shears points to no other error, we also reject his assertion that cumulative error justifies a new trial. Affirmed.

FACTS

The State charged Shears with assaulting Madeline Holden and Kerry McCarthy

at a fraternity party on April 12, 2007. At trial, Holden testified that she went to the fraternity's camouflage theme party that night with several friends, including McCarthy. When they arrived, they went directly to the basement, where 50 to 75 people were drinking and dancing.

Holden testified that Shears approached her and "sounded like he was trying to pick a fight with me." 2 Report of Proceedings (RP) (Mar. 13, 2008) at 54. She knew Shears through his brother. According to Holden, Shears was drunk, stumbling, and swearing. Holden testified that she walked away from Shears and then felt a drink poured on her head. She believed Shears poured the drink, and in response, she poured her drink on him. According to Holden, Shears then punched her face, causing her to fall to the ground.

McCarthy also testified. She said she saw Shears kicking Holden, who was on the floor. She ran to Shears, pushed him, and told him to get off Holden. She testified that Shears responded by punching her face with a closed fist. Alexandra Freeman, Nicole Santos, and Peter Lutovsky also attended the party. They each identified Shears as the assailant.

Soon after the assault, Holden and McCarthy went to the hospital. Dr. Scott Bryson testified that McCarthy's nose was broken. Dr. Richard Cummins testified similarly that Holden's nose was broken and her lip lacerated. Shears sought to admit Dr. Cummins's medical notes, which reported that Holden told him a former boyfriend assaulted her. The State objected, contending the statement was hearsay and the identity of Holden's attacker was not relevant to her treatment. The trial court excluded

the statement.

University of Washington Police Officer Raymond Wilson testified that he took Shears into custody shortly after the assault. He testified Shear's boots had blood on them. Officer Banyai Riepl testified that she intended to send the boots off for DNA (deoxyribonucleic acid) testing, but neglected to do so. Officer Riepl conceded this was an oversight.

In her closing argument, the prosecutor commented,

> Now, the detective did not have those boots tested for DNA. Was that a mistake, yes. Should she have, yes. She testified to that for you. That doesn't negate what the defendant did that night. The victims who endured what they endured should not be punished because the detective didn't send the boots in. That's not their fault.

4 RP (Mar. 18, 2008) at 97 (emphasis added). And in her rebuttal argument, the prosecutor said,

> Again, should the cops have tested the boots, yes, and they admitted that, but, ladies and gentlemen, this isn't reasonable doubt. . . .
> . . . . Should the cops have done something different? Potentially, maybe. In the boots, yes. Ladies and gentlemen, again, do not make the victims suffer. That is not reasonable doubt by any means. What that is is something that should have been done, yes, but that is not the victims' fault.

4 RP (Mar. 18, 2008) at 119–121 (emphasis added).

The prosecutor also argued that the witnesses who identified Shears as the assailant were credible. For Lutovsky, she noted that he testified against Shears despite Shears being a pledge in Lutovsky's fraternity. For Holden, the prosecutor pointed to her demeanor on the stand and how she "broke down" when reviewing what happened to her. For McCarthy, the prosecutor discussed her confidence in stating

who assaulted her. For Santos, the prosecutor argued that she had no grudge against Shears. The prosecutor also stated that the witnesses had no opportunity to coordinate their stories to falsely blame Shears for the attack. She concluded by stating, "[Lutovsky's] testimony was credible. Madeline Holden's testimony was credible. Kerry McCarthy's testimony is credible. Alexandra Freeman's testimony is credible. So is Nicole Santos['s]." 4 RP (Mar. 18, 2008) at 120. Shears did not object to any of the prosecutor's comments as improper.

The jury convicted Shears as charged. The trial court imposed a standard range sentence. He now appeals.

ANALYSIS

Exclusion of Medical Records

Shears argues the trial court erred when it denied his request to admit Dr. Cummins's notes. "Admissibility of evidence lies within the sound discretion of the trial court and the court's decision will not be reversed absent abuse of that discretion." State v. Hamlet, 133 Wn.2d 314, 324, 944 P.2d 1026 (1997).

Hearsay is not admissible unless a rule or statute provides otherwise. ER 802. Shears contends that the medical diagnosis exception to the hearsay rule applies here. That exception covers

> [s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

ER 803(a)(4). Under this exception, statements about the cause of an injury are

generally admissible, but statements attributing fault are generally not admissible. State v. Redmond, 150 Wn.2d 489, 497, 78 P.3d 1001 (2003).

Despite this general rule, statements identifying the perpetrator of sexual or domestic assault are sometimes admitted under ER 803(a)(4). This is because statements attributing fault can be "'relevant to the prevention of recurrence of injury.'" State v. Sims, 77 Wn. App. 236, 239, 890 P.2d 521 (1995) (quoting State v. Butler, 53 Wn. App. 214, 221, 766 P.2d 505, (1989)); see also State v. Price, 126 Wn. App. 617, 640, 109 P.3d 27 (2005) ("a statement attributing fault to an abuser can be reasonably pertinent to treatment"). For example, if a physician knows the attacker is a member of the victim's household, he or she can take steps to remove the victim from that environment. Sims, 77 Wn. App. at 239. A physician may also recommend special therapy or counseling as part of the proposed medical treatment. State v. Saunders, 132 Wn. App. 592, 608, 132 P.3d 743 (2006).

But if there is no ongoing relationship between the victim of an assault and the perpetrator, the identity of the perpetrator may not be "relevant to the prevention of recurrence of injury." For example, in State v. Huynh, 107 Wn. App. 68, 73, 26 P.3d 290 (2001), the defendant sought to admit medical records containing allegations that a police officer assaulted him during his arrest three days earlier. This court affirmed the trial court's decision to exclude the records because the defendant was no longer in the officer's custody at the time he made the statements and, consequently, the statements were not relevant to preventing further injury. Huynh, 107 Wn. App. at 75.

When a trial court determines whether statements attributing fault are admissible

under ER 803(a)(4), "[m]uch . . . depends on the context in which such statements are made." In re Dependency of Penelope B., 104 Wn.2d 643, 656, 709 P.2d 1185 (1985). Here, the disputed statement indicated that Holden's former boyfriend was the assailant. There is no evidence she lived with him or had any ongoing relationship with him. Further, there is no evidence that Dr. Cummins relied on the statement for purposes of medical treatment or diagnosis. The record does not demonstrate that he advised Holden about domestic counseling services or instructed her to change her housing arrangements to avoid contact with the former boyfriend. Under these circumstances, it is not clear that the statement was relevant to preventing further injury to Holden, and the trial court did not abuse its discretion in excluding it.

Even if we were to conclude the trial court erred, the error would be harmless. During trial, Shears's counsel questioned Holden about her statement to Dr. Cummins and she explained that she intended to tell the doctor it was the brother of her former boyfriend who assaulted her:

> Q. In fact, didn't you tell the doctor that it was a boyfriend that had assaulted you at the party?
> A. No. They might have gotten my words mixed up. I told them that I had dated someone, and it was his brother.
> Q. You told them that you had dated someone and it was his brother?
> A. Yes.
> Q. And you think the doctor would make a mistake and say it was your boyfriend?
> A. It's possible.

2 RP (Mar. 13, 2008) at 83. This explanation—combined with the testimony of the eyewitnesses who identified Shears as the attacker—demonstrates that admission of the underlying medical records into evidence would not have affected the trial's

outcome.

Prosecutorial Misconduct

Shears also contends his right to a fair trial was denied because the prosecutor made improper comments during closing argument. Prosecutor misconduct during closing argument may deprive the defendant of the constitutional right to a fair and impartial trial. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). But to prevail on a claim of prosecutorial misconduct a defendant "must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial." State v. Miles, 139 Wn. App. 879, 885, 162 P.3d 1169 (2007). Conduct is not prejudicial unless there is a substantial likelihood that it affected the jury's verdict. State v. Munguia, 107 Wn. App. 328, 336, 26 P.3d 1017 (2001). Moreover, if the defendant fails to object to an allegedly improper comment, the error is waived "unless the improper argument was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." State v. Perez-Mejia, 134 Wn. App. 907, 917 n.10, 143 P.3d 838 (2006).

Shears alleges two instances of misconduct. First, he argues that the prosecutor improperly sought to inflame the jury's passions by exhorting them not to punish Holden and McCarthy for the police's failure to submit the boots for DNA testing. Second, he contends the prosecutor improperly vouched for the credibility of the State's witnesses by arguing that Lutovsky, Holden, McCarthy, Freeman, and Santos were credible.

It is improper for a prosecutor to make comments "calculated to appeal to the jury's passion and prejudice and encourage it to render a verdict on facts not in evidence . . . ." State v. Stover, 67 Wn. App. 228, 230–31, 834 P.2d 671 (1992). Here, the defense argument was that the police's failure to order DNA testing of the boots and the lack of DNA test results in evidence created a reasonable doubt about the assailant's identity. The prosecutor's comments suggested that accepting this theory and acquitting Shears would amount to "punishing" the victims or making them "suffer." 4 RP (Mar. 18, 2009) at 97, 121. These comments were improper because they constituted a direct appeal to the jury's passions, encouraging them to focus on their sympathy for the victims rather than the evidence. "Information regarding the consequences of a verdict is . . . irrelevant to the jury's task." Shannon v. United States, 512 U.S. 573, 579, 114 S. Ct. 2419, 129 L. Ed. 2d 459 (1994).

Nevertheless, Shears is not entitled to reversal unless he can demonstrate that the prosecutor's misconduct was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." State v. Gentry, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995). Here, while the prosecutor's argument was improper, an instruction to the jury to disregard the reference to "punishing" the victims and to not consider the consequences of its verdict would have been adequate to obviate any prejudice. Because Shears fails to demonstrate enduring and resulting prejudice, his first misconduct argument fails.

Shears also argues the prosecutor improperly vouched for the credibility of the State's witnesses during closing argument by stating, "[Lutovsky's] testimony was

credible. Madeline Holden's testimony was credible. Kerry McCarthy's testimony is credible. Alexandra Freeman's testimony is credible. So is Nicole Santos['s]." 4 RP (Mar. 18, 2008) at 120. It is improper for a prosecutor to express a personal opinion about a witness's credibility. State v. Swan, 114 Wn.2d 613, 664, 790 P.2d 610 (1990). But a prosecutor has wide latitude in closing argument to draw and express reasonable inferences from the evidence. State v. Hoffman, 116 Wn.2d 51, 94–95, 804 P.2d 577 (1991). Prosecutors are permitted to argue about a witness's veracity based on the evidence in the case. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995); State v. Rivers, 96 Wn. App. 672, 675, 981 P.2d 16 (1999).

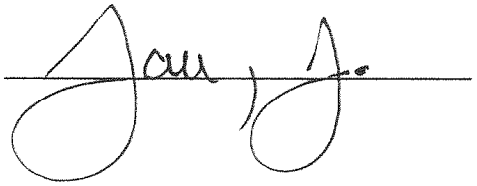
Here, reading the prosecutor's comments in context, she did not express a personal opinion about the witness's credibility. Rather, the prosecutor argued the witnesses were credible based on the evidence, including their lack of bias, demeanor when testifying, lack of opportunity to coordinate false testimony, and relationships with Shears. This was not improper.

Cumulative Error

Finally, Shears argues that cumulative error denied him a fair trial. "The cumulative error doctrine applies only when several trial errors occurred which, standing alone, may not be sufficient to justify a reversal, but when combined together, may deny a defendant a fair trial." State v. Hodges, 118 Wn. App. 668, 673–74, 77 P.3d 375 (2003). The defendant bears the burden of proving he was prejudiced by the accumulation of errors. Price, 126 Wn. App. at 655. Here, Shear's cumulative error argument fails because only one error occurred—the prosecutor's improper comments

about "punishing" the victims—and that error was not prejudicial.

For the foregoing reasons, we affirm.



WE CONCUR: